1989

Olympus Hills Shopping Center, Ltd. v. Wasatch Bowling, Inc. : Reply Brief

Utah Court of Appeals

Joseph C. Rust, Scott O. Mercer; Attorneys for Respondent.
Ronald C. Barker, Mitchell R. Barker; Attorneys for Appellant.

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

OLYMPUS HILLS SHOPPING CENTER, LTD., a Utah limited partnership, Plaintiff/Appellee, **v.** **WASATCH BOWLING, INC.,** a Utah Corporation, Defendant/Appellant.	**REPLY BRIEF** OF APPELLANT **Docket No. 890598-CA** District No. C87-8427 Priority Classification 14b

* * * *

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON PRESIDING
POURED OVER FROM UTAH SUPREME COURT (#890343)

* * * *

Ronald C. Barker, #0208
Mitchell R. Barker, # 4530
Attorneys for Defendant/Appellant
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone: (801) 486-9636

Joseph C. Rust
Scott O. Mercer
Attorney for Plaintiff/Respondent
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

OLYMPUS HILLS SHOPPING CENTER, LTD., a Utah limited partnership, Plaintiff/Appellee, v. **WASATCH BOWLING, INC.,** a Utah Corporation, Defendant/Appellant.	**REPLY BRIEF** OF APPELLANT **Docket No. 890598-CA** District No. C87-8427 Priority Classification 14b

* * * *

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON PRESIDING
POURED OVER FROM UTAH SUPREME COURT (#890343)

* * * *

Ronald C. Barker, #0208
Mitchell R. Barker, # 4530
Attorneys for Defendant/Appellant
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone: (801) 486-9636

Joseph C. Rust
Scott O. Mercer
Attorney for Plaintiff/Respondent
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Cases

B. Statutes and Rules

C. Other Authorities

SUMMARY OF ARGUMENT

Olympus has, for the most part, skirted the arguments made in Wasatch's opening brief. Its philosophy appears to be one of ignoring the lower court's errors, since it feels entitled to win and did. To argue that "all's well that ends well" may work if an error is harmless, but here the lower court's errors put Wasatch out of business.

The case was based originally on the unlawful detainer statute. The court erred in evicting Wasatch when the statute no longer applied, and since whether the contract provides for eviction is an unresolved question of fact.

Requiring two $300,000 supersedeas bonds was a clear abuse of discretion, which put Wasatch out of business pending this appeal.

ARGUMENT

1. **Amendment cannot turn an unlawful detainer action into one at common law.** Olympus' argument on this issue is mostly a pitch for the greater ease caused by allowing amendment of its unlawful detainer complaint. Olympus also argues that Wasatch was not prejudiced, despite the fact that commencing a new action would have given an opportunity for a hearing on the

amount owed and an opportunity to cure before eviction. There is no argument proffered to rebut the facts that:

a. Jurisdiction was obtained by a complaint limited to statutory unlawful detainer, with a three day notice.

b. A year passed after the three days expired.

c. Only $17,000 was claimed as due in the three day notice and complaint, and more than that was paid before summary judgment was eventually granted a couple of years later.

d. The judgment was based upon a letter agreement entered into and allegedly breached a year after the three days to cure expired.

e. No eviction clause was contained in the letter agreement, which ran for a definite term of two years. See Appellant's Brief, Appendix II.

2. This question is jurisdictional. Therefore, whether Wasatch was prejudiced by the court allowing the amendment is beside the point.

Since the action of unlawful detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, the statute is what confers jurisdiction. See, Chapter 36, Title 78, Utah Code; 35 AmJur 2d Forcible Entry & Detainer § 33.

Those statutes must therefor be strictly construed, or jurisdiction will fail to attach, and the proceeding will be

coram non judice and void. Schroeder v. Woody, 166 Or. 93, 109 P.2d 597, 599-600 (1941); 35 AmJur 2d Forcible Entry & Detainer § 33, n. 5, and cases there cited; Color-Ad Packaging, Inc. v. Kapak Industries, Inc., 285 Minn. 525, 172 NW2d 568, ovrld. on other grounds, Township Board of Lake Valley Township v. Lewis, 234 NW2d 815 (court without jurisdiction to enter judgment in unlawful detainer action where return date of summons was less than the three days required by statute).

The court in an unlawful detainer action does not proceed as a court of general jurisdiction, but derives its authority wholly from the statute. So it becomes a court of special and limited jurisdiction. Id. So the lower court had no authority to allow amendment of the action into one for common law restitution. Other rights, such as those sounding in equity, are not included in such an action. See, 35 AmJur 2d Forcible Entry & Detainer § 33, n. 5, and cases there cited.

3. **Execution of the letter agreement is an issue of fact preventing summary judgment.** In the Amended Complaint Olympus admitted the parties entered into the letter agreement (¶ 5), and alleged a default under that agreement (¶ 6). R. 89-92. A copy of the agreement, fully executed by both Olympus and Wasatch, was even attached as Exhibit A and incorporated by reference into the Amended Complaint. R. 92. A copy of the letter is attached as Appendix II to the opening brief.

Nevertheless, faced with the fact the letter agreement seems to supersede for its two year term the default provisions of the lease, Olympus now disputes the validity of the letter agreement because "the parties were never able to agree whether the percentage rent in paragraph 1 was monthly or annual." Response Br. p. 6; see also p. 13, § II.

Of course the ambiguities (such as whether the percentage was annual or monthly and whether default could result in restitution) would be construed against Olympus since its predecessor in interest drafted the agreement. Hoffman v. Life Ins. Co. of North America, 669 P.2d 410 (Utah 1983). But aside from that, the uncertainty asserted points out that issues of fact existed, precluding summary judgment under Rule 56, URCP.

4. Effect of letter agreement is another factual question, precluding summary judgment. Olympus mistakenly read Wasatch's opening brief to allege that the letter agreement stated there would be no forfeiture clause. Response Br. at 13. Actually, Wasatch pointed out that the letter superseded the lease, and contained no forfeiture clause. Nor did it incorporate (by reference or otherwise) the forfeiture provisions of the lease.

Of course Olympus asserts the remedies under the original lease somehow survived the letter agreement. This

position of Olympus requires evidence and a factual finding. A conflict as to the terms the parties intended to include in an agreement presents a factual question for the jury. Hays v. Underwood, 411 P.2d 717, 720-721, 196 Kan. 265 (1966).

Moreover, the Court's Order of Partial Summary Judgment doesn't even state the authority for the eviction. See Appendix IV, Opening Brief. It appears Olympus itself is not sure whether its claimed entitlement to eviction is based upon statute, the terms of the letter agreement, the lease, or some common law source. This was pointed out by Wasatch in its opening brief. P. 3. Yet Olympus still has not cleared up the question. Without a forfeiture clause, Olympus' remedy was limited to damages. Hackford v. Snow, 657 P.2d 1271, 1275 (Utah 1982).

5. The issue of partial payments also precludes summary judgment. Section III of Olympus' brief disputes whether payments it accepted from Wasatch after the letter agreement was signed are properly discussed on appeal. In doing so, Olympus unwittingly illustrates why eviction was not proper without a trial. Olympus states, "Wasatch occasionally made payments toward old obligations to Olympus. However, Wasatch never became current in its lease payments." Response Br. p. 15. How can Olympus make such an admission, and deny existence of an issue of fact.

In fact, summary judgment as to damages has now been sought by Olympus at the trial court level. The motion was heard a week ago. The question of partial payments and credits was so much an issue, the motion was denied (without prejudice) and Olympus was required to provide an accounting before renewing its motion. The uncertainty of the facts, and close correlation between eviction and damages (treated in Section 6, below) are again illustrated by Olympus in its brief: "If this court determines that, due to the remaining claims for rent and attorneys fees, the eviction judgment was not a final judgment for the purposes of executing the judgment, Olympus is willing to waive its claim for the rent due." Response Br. p. 18.

6. **Olympus ignores the notice issue.** This was treated in sections 5 and 7 of Wasatch's brief. pp. 3-5. Olympus may not summarily evict Wasatch without complying with very specific statutory notices and demands. These notices must be served "after default". § 78-36-3(1)(c), Utah Code. No further action can be taken until three days "after" the notice is served. Id. Yet eviction was allowed here although a new agreement was entered into long after the original notices. No new notices were served after any new breach.

7. **Multiple claims were not stated.** Olympus asserts (Br. p. 15-17) that because more than one kind of relief was

sought, a Rule 54(b) URCP certification of the writ of restitution only was permissible. However, the fact remains that the complaint was stated as one claim for relief. And it is particularly inappropriate to allow certification of part of the case in this instance, where the legal basis for restitution is far from clear.

Even when the trial court certifies a claim under Rule 54(b), this does not make the order appealable as a final decision if only a single claim is presented in the case and the order does not dispose of the entire case. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 47 L.Ed. 2d 435, 96 S.Ct. 1202 (1976); Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 64 L.Ed. 2d 1, 100 S.Ct. 1460 (construing the federal rules 54(b) corollary). Here only one breach is claimed and and multiple remedies are sought. The identical facts apply to each remedy.

> While, for purposes of FRCP 54(b), a separate claim need not be predicated on acts entirely distinct from those on which other claims are based, there must be some variation in the facts required to establish each separate claim, and the facts underlying each claim must stated different legally enforceable claims which could have been separately enforced, since if only one set of facts is alleged, a mere variation in legal theories in insufficient to give rise to several claims.

2 Fed. Proc., L. Ed. § 3:323 (authorities omitted); and see cases there cited. "Rule 54(b) is identical in all material respects to the corresponding federal rule, and in construing

our rules, we look to authorities which have interpreted the federal rule." Allen Steel Co. v. Crossroads Plaza Associates, 119 Utah Adv. Rep. 6, 9 (S.Ct. 1989).

A finding of liability which reserves the issue of damages is not appealable, even though the trial judge certified it as such. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 47 L.Ed. 2d 435, 96 S.Ct. 1202 (1976). Certification does not confer jurisdiction on the Court unless a claim is actually and wholly disposed of. Allen Steel Co. v. Crossroads Plaza Associates, 119 Utah Adv. Rep. 6, 9 (S.Ct. 1989).

Olympus challenges Wasatch (p. 17) to point to some reason why there is a just reason for delay. Of course throwing Wasatch out of its bowling alley without a determination of its default more than sufficient reason. In fact, the certification rule should be used only in an infrequent, harsh case. Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360, 32 ALR Fed. 751 (CA4 1975). There must be some danger of hardship or injustice through delay if the case were **not** certified for appeal. Campbell v. Westmoreland Farm, Inc., 403 F.2d 939 (CA2 1968). Judicial policy dictates against piecemeal appeals. 2 Fed. Proc., L. Ed. § 3:324.

8. **Wasatch's supersedeas bond entitled it to a stay of execution.** Wasatch argued extensively in its opening brief (pp. 8 through 12) that the trial court erred in:

a. Requiring a surety of $300,000 to stay in possession of the bowling alley pending appeal when annual rent is only about $30,000,

b. Requiring two sureties rather than one, each for $300,000 (the maximum amount sought by Olympus), and

C. Failing to stay execution though one of the two bonds was approved.

Yet Olympus responds in three paragraphs, merely by saying the court did not approve the bonds so a stay was not required. Response Br. pp. 18, 19. Of course this begs the question: should the court have refused to find the sureties were adequate?

As Wasatch pointed out, the record indicates the bond of $300,000 was approved by the lower court. R. 243-244. This Olympus denies, without support or citation to the record. Response Br. 18. Wasatch's understanding is that the court refused to stay execution because a **second** bond was not approved, since the surety was unavailable for cross-examination on the appointed day. R. 156-159 ($50,000 bond filed), R. 177-178 ($100,000 bond approved, subject to justification), R. 189-193 (two $300,000 bonds filed), 205-207 (two $300,000 bonds required), R. 243 (court approves of bonds filed, but allows time for filing of corporate bonds), R. 244 (vague entry finding the two $300,000 bonds "acceptable" but ordering defendant to "post a surety bond of $300,000" or the writ of restitution

would be granted), R. 257 (Writ of Restitution served). Of course two such bonds had already been posted.

The record is difficult to decipher with relation to the bond proceedings. Since the lower court refused a stay of execution, it was Olympus' responsibility to prepare a written order making the judge's findings and holdings clear. It is impossible to tell from the minute entries exactly what occurred or for what reason.

As Wasatch pointed out in its opening brief (p. 11-12), the supersedeas bond may include only such sum as will secure the "amount recovered for the use and determination of the property, the costs of the action, costs to appeal, interest, and damages for delay." Former Rule 73(d), URCP (1984). The court made no findings to reach the $300,000, a figure ten times the amount of a year's rent of the premises. Yet **two** bonds in that amount were required.

9. **The bankruptcy order did not affect this case.** Yet Olympus apperas in section VI of its brief to make an argument akin to res judicata or collateral estoppel. Yet it does so without reference to any authority. Response Br. pp. 19-20.

In the midst of the eviction, Wasatch filed a bankruptcy which was later dismissed. Olympus has attached two orders of Bankruptcy Judge Glen E. Clark, and has argued that they somehow signify a permanent termination of the leasehold independent of

this action. Response Br. pp. 19-20; orders attached as Exhibits D and E.

It is worthy of note that the two bankrtuptcy orders both followed the appeal in this matter, which was filed about June 13, 1989. An act of the bankruptcy court cannot take precedence over this appeal, particularly when the issue of whether the lease was terminated is a state law issue. It would be unwise to appeal the bankruptcy decision when the same question is already on appeal in this Court.

The June 28, 1989 order (Olympus' Exhibit D) was merely one for temporary relief. It held "on the sole basis that [Olympus] will suffer irreparable and immediate injury, loss or damage", that Olympus could complete its state court action for a writ of restitution. P. 2.

The August 8, 1989 order (Olympus' Exhibit E) simply observes what the trial court in this case had done: to issue of writ of restitution and terminate the lease. ¶ 2, 4. Judge Clark is in essence deferring to the trial court judge's finding, not making a factual finding of his own.

After making the observations about the state court's prior holdings, Judge Clark orders only "that the creditor Olympus Hills Shopping Center, Ltd. is granted relief from the stay **to pursue its state-law remedies with respect to the premises** known as the Wasatch Bowling Lanes." Olympus' Exhibit

E, p. 3 (emphasis supplied). The language of the order certainly does not sound like an attempt to override the state court action. This appeal represents the efforts of both sides to pursue those state remedies.

10. **Olympus is not entitled to attorney fees.** This is true even if the Court were to somehow find against Wasatch on every issue. Rule 33(a), R. Utah Ct. App. requires a finding that the appeal is more than meritless. It must be frivolous. O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987). It must have "no reasonable or factual basis as defined in Rule 40(a)." Id. It must be marked by dilatory conduct or conduct designed to mislead the court and which benefits only the appellant. Olympus has not shown (and cannot) such conduct on the part of Wasatch here. Olympus does make some bald assertions, without support by any record, of acts it believes Wasatch committed to "harass" Olympus. Response Br. pp. 20-21. None of the acts is relevant to the appeal, however.

Wasatch believes its arguments have merit, and are entitled to prevail. This appeal is not a mere effort to harass or delay, and is brought in good faith. Sanctions for frivolous appeals should be applied only in egregious cases, to avoid chilling the right to appeal erroneous lower court decision. Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988).

CONCLUSION

Having started as an unlawful detainer action, the lower court exceeded its jurisdiction in evicting Wasatch on a common law basis. Issues of fact remain as to whether the letter agreement of the parties even including an eviction provision.

Separate remedies do not constitute separate causes of action which can be certified for a piecemeal appeal. And the trial court abused its discretion in requiring two $300,000 supersedeas bonds to stay execution pending this appeal.

Wasatch asks that the trial court's ruling be reversed, and that it be required to restore Wasatch to possession of the bowling alley.

Respectfully so requested this 20th day of February, 1990.

Ronald C. Barker
Mitchell R. Barker
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 1990 I caused to be mailed, postage prepaid, or hand delivered, the original and seven copies of the foregoing to the office of the Clerk of the Utah Court of Appeals, and that I caused 4 true and correct copies of the foregoing to also be hand delivered or served by postage prepaid mail to the following at the address indicated:

Joseph Rust, Esq.
Scott O. Mercer, Esq.
36 South Main Street # 1200
Salt Lake City, Utah 84111

Mitchell R. Barker